No. 05-848

IN THE
Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *ET AL.*,
PETITIONERS,

v.

DUKE ENERGY CORPORATION,
RESPONDENT

On Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF APA WATCH IN SUPPORT OF RESPONDENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae APA Watch is a nonprofit association dedicated to ensuring that federal, state, and local agencies comply with applicable rulemaking, information-dissemination, and information-quality requirements. On its own and through its membership, APA Watch devotes significant effort to combat federal agencies' amending regulations by memoranda and reinterpretation, without the notice-and-comment rulemaking required by the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA").

ISSUES PRESENTED

Through the decisions below, respondent Duke Energy Corporation ("Duke") prevailed in a civil enforcement action brought under the Clean Air Act, 42 U.S.C. §§7401-7671q, by the Environmental Protection Agency ("EPA") and petitioner environmentalist intervenors. *See* 42 U.S.C. §§7413(b)(1) (civil actions by EPA), 7604(a)(3) (citizen suits). As now before this Court, this case presents two questions:

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the timely filing of all *amicus curiae* briefs in this matter. The parties' letters of consent have been lodged with the Clerk of the Court.

1. Do the decisions below contravene Clean Air Act §307(b)(2), which provides that EPA action that was reviewable under §307(b)(1) "shall not be subject to judicial review in civil or criminal proceedings for enforcement"?

2. If §307(b)(2) does not preclude courts' considering arguments on the proper interpretation of the applicable regulations, do Duke's actions at various power plants in the Carolinas qualify as "major modifications" that triggered review under the Clean Air Act's Prevention of Significant Deterioration ("PSD") permitting program?

STATEMENT OF FACTS

Amicus curiae APA Watch adopts the facts as reported by the Fourth Circuit, 411 F.3d at 544-45 (Pet. App. 5a-7a), and the district court, 278 F.Supp.2d at 622-26 (Pet. App. 23a-31a). The facts, however, are essentially irrelevant because EPA and the environmentalist intervenors have stipulated that Duke prevails under Duke's interpretation of the applicable regulations. 411 F.3d at 546 (Pet. App. 9a).

LEGAL BACKGROUND

As signaled in the Statement of Facts, *supra*, this litigation hinges on what the applicable regulations actually provide. Accordingly, this section reviews the history and text of the regulations and EPA's evolving interpretations.

For existing stationary sources like Duke's power plants here, PSD applicability turns initially on the definition of "modification." *See* 42 U.S.C. §§7479(2)(C) (adopting §111(a)(4)'s definition of modification for PSD permitting), 7411(a)(4) ("'modification' means any physical change in, or change in the method of operation of, a stationary source

which increases the amount of any air pollutant emitted by such source"). In *Alabama Power,* the reviewing court recognized that "alterations of almost any plant occur continuously; whether to replace depreciated capital goods, to keep pace with technological advances, or to respond to changing consumer demands." *Alabama Power Co. v. Costle,* 636 F.2d 323, 401 (D.C. Cir. 1979). To focus administrative and industry resources on those modifications that may significantly impact air quality, EPA established *de minimis* thresholds for the net emissions increases required to trigger PSD review. 40 C.F.R. §52.21(b)(2), (3), (23).

Although EPA's final 1978 PSD regulations had focused on source-wide uncontrolled potential emissions to determine whether "modifications" qualified as "major," EPA's final 1980 PSD rule "follow[ed] the lead" of the *Alabama Power* court to focus of the netting analysis to actual emissions, while continuing to require a "modification" as defined in §111(a)(4). *See* 45 Fed. Reg. at 52,700; *see also Alabama Power,* 636 F.2d at 353-55 (invalidating 1978 rule's thresholds for increases above source-wide uncontrolled potential emissions). In doing so, EPA recognized the harm of "paper offsets" that would set sources' baselines for netting too high (and thereby allow new or modified units to avoid triggering PSD by claiming credit for pollution reductions that had never actually occurred). *See* 45 Fed. Reg. at 52,700. Similarly, with respect to PSD increments, EPA explained that "it is unwise to restrict source growth based only on emissions that a source is permitted to emit but which, in many instances, have not been and are not likely to ever be emitted." 45 Fed. Reg. at 52,718. Accordingly, EPA recognized that "the most reasonable approach, consistent with the statute, is to use actual source emissions, to the extent possible," for both source-wide netting and for calculating PSD increment

consumption. *Id.*[2] In sum, EPA's 1980 actual-emission approach prevents both underregulation and overregulation.

To determine applicability under EPA's 1980 PSD regulations, therefore, "the first step... is to determine whether the physical or operational change in question would result in an increase in 'actual emissions'" (*i.e.*, whether the change qualifies as a "modification" under §111(a)(4)). 45 Fed. Reg. at 52,698.[3] If not, that ends the inquiry. *Id.* If so, the next step analyzes whether that modification qualifies as "major" based on a comparison of source-wide actual emissions before and after the physical or operational change. To conduct this netting analysis, the regulations rely upon a series of somewhat overlapping definitions for potential, allowable, and actual emissions. 40 C.F.R. §52.21(b)(4), (16), (21). For existing emitting units with source-specific allowable emissions for the unit, the permitting authority may assume that actual emissions equal

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[2] Although the quoted text concerns increment consumption, the preamble's "Modification" section refers to the "Increment Consumption" section "[f]or a fuller discussion of the concept of 'actual emissions.'" 45 Fed. Reg. at 52,699 (*i.e.*, the "actual emission" focus applies both to determining whether a major modification occurred and to calculating increment consumption).

[3] Certain physical and operational changes are not activities that can give rise to a "modification," including routine maintenance, repair and replacement and changes in the hours of operation, notwithstanding their effect on emissions. 40 C.F.R. §52.21(b)(2)(iii)(a), (b)(2)(iii)(f).

the unit-specific allowable emissions. 45 Fed. Reg. at 52,699, 52,718; 40 C.F.R. §52.21(b)(21)(iii). Otherwise, the analysis uses the pre-modification rate at which the unit actually emitted pollutants over a representative baseline. 40 C.F.R. §52.21(b)(21)(ii). For units that have not begun normal operations, the analysis assumes that actual emissions equal the controlled potential to emit. 40 C.F.R. §52.21(b)(21)(iv), (4). Consistent with *Alabama Power and* the 1980 rules, modified units that have commenced normal operations use an "actual-to-actual" netting test that relies on actual (or unit-specific allowable) emissions to calculate a net emissions increase.

In several PSD applicability determinations issued circa 1981-1983, Edward E. Reich, then Director of EPA's Division of Stationary Source Enforcement ("DSSE"), interpreted the PSD regulations consistently with the New Source Performance Standards ("NSPS") regulations issued to implement §111(a) and with EPA's actual-to-actual focus. *See, e.g.,* JA 23-37 (PSD applicability analyses by Mr. Reich); 43 Fed. Reg. 26,380, 26,396 (1978) (§169(2)(C) "in effect adopts the definition of 'modification' under [§111(a)] for purposes of PSD"). As the DSSE Director during the time relevant to this litigation, Mr. Reich played an integral and authoritative part in implementing EPA's PSD regulations. *See, e.g.,* JA 23-37 (PSD applicability analyses by Mr. Reich); *see also* 44 Fed. Reg. 54,109 (1979) (*Federal Register* notice publishing EPA's final agency action on PSD applicability question signed by Mr. Reich); *Potomac Elec.*

Power Co. v. EPA, 650 F.2d 509, 514-15 (4th Cir. 1981) (citing a memorandum by Mr. Reich as *EPA's* conclusion).[4]

Unfortunately for U.S. industry and unnecessarily for U.S. air quality, EPA has confounded the "modification" and "major modification" tests, advocating presumptive use of an "actual-to-potential" test to determine PSD applicability. *See Amici Curiae* Br. of Nat'l Parks Conservation Ass'n et al. at 6-7 & n.3.[5] Because it compares emissions from historic actual operations to fulltime future operations, EPA's actual-to-potential test finds PSD applicability whenever a source that operates less than fulltime (*i.e.*, less than 24 hours per day, 7 days per week) makes a physical or operational change that emits the *same rate* of pollutants as the pre-change unit. Indeed, if a unit operating at 50% capacity installs equipment that emits 25% less emissions, the actual-to-potential test would find an emissions increase because it compares 50% capacity at the original emission rate with

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[4] The efforts to characterize Mr. Reich as a low-level employee are simply revisionist history. Envtl. Def. Br. at 35 n.27; EPA Br. at 28. The record more than supports the district court's determination that Mr. Reich authoritatively expressed EPA's then-current interpretation, *see* 278 F.Supp.2d at 642 (Pet. App. 61a-62a); *cf.* 411 F.3d at 545-46 (Pet. App. 8a-9a), consistent with an unmodified part of EPA's 1978 PSD rulemaking.

[5] Prospectively from 1992, EPA added an "actual-to-representative-actual" test for electric utility steam generating units, but not for other source types. 57 Fed. Reg. 32,314 (1992).

100% capacity at the lower emission rate, notwithstanding that there is no "modification" within the meaning of §111(a)(4) and notwithstanding that the PSD (like NSPS) allows the facility to increase its hours of operation without triggering review. Thus, contrary to its originally characterizing this policy as "unwise," EPA now finds modifications "based only on emissions that a source is permitted to emit but which, in many instances, have not been and are not likely to ever be emitted." 45 Fed. Reg. at 52,718; *see also* note 2, *supra*. This EPA reinterpretation, if accepted, would cost billions of dollars in unnecessary pollution controls and relocation of facilities to escape the expenses associated with endless preconstruction permit proceedings.

SUMMARY OF ARGUMENT

On jurisdiction, §307 does not apply by its terms, §307 would not preclude Duke's arguments on the proper interpretation of the PSD regulations if it did apply, and §307 would be unconstitutional if it precluded Duke's arguments and thereby authorized EPA to amend the regulations via post-promulgation reinterpretation (Section I). On the merits, EPA's reinterpretation of its regulations does not warrant deference and *a fortiori* its reinterpretation of the applicable North and South Carolina PSD regulations would not warrant deference, even if EPA had authority unilaterally and summarily to reinterpret those states' regulations (Section II).

ARGUMENT

I. §307 DOES NOT PRECLUDE DUKE'S ARGUMENTS

On threshold jurisdictional questions, a party establishes the court's jurisdiction if the court would have jurisdiction *under that party's* interpretation of federal law, notwithstanding that the court may lack jurisdiction *under the adverse party's* interpretation. *Osborn v. Bank of U.S.*, 22 U.S. (7 Wheat.) 738, 822 (1824); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983). At the jurisdictional threshold, this Court must assume that the applicable national and regional regulations bore Duke's proffered interpretation when promulgated in 1980 and 1982, respectively. Under that assumption, §307(b)(2) does not apply here, §307 would not prevent the Fourth Circuit's action if it did apply, and §307 would violate the Constitution if it allowed EPA summarily to amend regulations by reinterpreting them, without judicial recourse.

By way of background, §307(b)(1) provides for direct appellate review in the D.C. Circuit of "any... nationally applicable regulations promulgated[] or final action taken" by EPA, and for direct appellate review in the appropriate circuit of "locally or regionally applicable" EPA regulations and final actions. 42 U.S.C. §7607(b)(1).[6] Petitioners must

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[6] Locally or regionally applicable regulations or actions are reviewable in the D.C. Circuit if EPA's *Federal Register* notice publishes a finding that its regulation or action "is based on a determination of nationwide scope or effect." *Id.*

file their petition for review within 60 days of EPA's noticing the regulation or action in the *Federal Register* or, for petitions based on after-arising grounds, within 60 days after those grounds arise. *Id.* Section 307(b)(2) prohibits civil or criminal defendants' seeking judicial review of EPA actions reviewable under §307(b)(1) in the enforcement proceeding. 42 U.S.C. §7607(b)(2). Section 307(e) provides that nothing in the Clean Air Act authorizes judicial review of EPA regulations or orders, except as provided in §307. 42 U.S.C. §7607(e). Section 307(d)(1) exempts enumerated EPA regulations and other final actions from APA review, but that APA exclusion expressly does not apply to interpretive rules. 42 U.S.C. §7607(d)(1).

A. §307(b)(2) Does Not Apply

EPA argues that §307(b)(2) precludes review of the PSD rules because review was available under §307(b)(1), as evidenced by actual proceedings in the D.C. Circuit. EPA Br. at 14. Even assuming this to be true (and Duke disputes it) for the *national* PSD rules, EPA's argument is inapposite to the purported change to the *regional* PSD rules for North and South Carolina. Because it has not taken any action (other than this litigation) to amend the North or South Carolina PSD rules or assume federal enforcement, EPA cannot argue that review was available under §307(b)(1). *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 240-41 (1980) (filing complaint is not final agency action that triggers APA review); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) ("phrase 'final action'... bears the same meaning in §307(b)(1) that it does under... 5 U.S.C. §704"). In any event, because EPA did not issue a *Federal Register* notice containing findings of national scope and effect, §307(b)(1) review would lie in the Fourth Circuit, not the D.C. Circuit.

Moreover, even as to the *national* rules, EPA, the intervenors, and their supporting *amici* misconstrue Duke's (and the Fourth Circuit's) arguments. Duke does not seek to review (*i.e.*, to invalidate) EPA's 1980 PSD rulemaking. Instead, Duke merely asked the courts below and asks this Court to interpret those regulations consistently with their promulgation and to ignore EPA's subsequent, inconsistent and procedurally invalid reinterpretations of those regulations.[7]

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[7] Significantly, review of EPA's reinterpretation based on correspondence with the Wisconsin Electric Power Company took place in the Seventh Circuit, not the D.C. Circuit. *Wisconsin Elec. Power. Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) ("*WEPCO*"). Moreover, although the preambles to EPA's post-*WEPCO* PSD rulemaking discussed PSD generally, those preambles did not amend the PSD regulations except prospectively as specifically proposed and promulgated. *Nat'l Tour Brokers Ass'n v. U. S.*, 591 F.2d 896, 899 & nn.8-10 (D.C. Cir. 1978) (where self-described interpretive rule required notice-and-comment rulemaking, the fact that the agency provided notice and took comment does not satisfy the notice-and-comment rulemaking requirement); *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) ("agency may not introduce a proposed rule in [the] crabwise fashion" of merely discussing the issue in the preamble to a rulemaking on another issue).

B. §307 Does Not Preclude Courts' Declaring Law

Assuming *arguendo* that §307(b)(2) applies here, federal courts outside the District of Columbia and this Court have authority to declare the law in the process of deciding a case or controversy properly before them.[8] Moreover, even if EPA's sovereign immunity would present an obstacle to a federal court's declaring the law, the environmentalist intervenors render sovereign immunity irrelevant.

APA and Declaratory Judgment Act

The federal-question statute, 28 U.S.C. §1331, provides subject-matter jurisdiction for nonstatutory review of federal agency action. *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (1976 amendments to §1331 removed the amount-in-controversy threshold for "any [federal-question] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity") (*quoting* Pub. L. 94-574, 90 Stat. 2721 (1976)); *Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 608 n.6 (1978) ("Nor does it matter that the complaint does not... assert §1331(a) as a

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[8] Of course, to the extent that Duke could have brought an action directly in the Fourth Circuit under §307(b)(1) to challenge EPA's amendments by reinterpretation of the regionally applicable North or South Carolina PSD rules, the district court or this Court could transfer this action to the Fourth Circuit, 28 U.S.C. §1631 (court lacking subject-matter jurisdiction may transfer an action to a court that has subject-matter jurisdiction), which would produce the same result that the Fourth Circuit already has reached.

basis of jurisdiction, since the facts alleged in it are sufficient to establish such jurisdiction"); *Chrysler Corp. v. Brown,* 441 U.S. 281, 317 n.46 (1979) (§1331 provides subject-matter jurisdiction to review agency action).

In 1980, Congress amended §1331 to its current form, Pub. L. 96-486, §2(a), 94 Stat. 2369 (1980), but that amendment did not repeal §1331's 1976 amendment, relied on by *Sanders* and its progeny. H.R. REP. NO. 96-1461, at 3-4, *reprinted in* 1980 U.S.C.C.A.N. 5063, 5065; *Bowen v. Massachusetts,* 487 U.S. 879, 891 n.16 (1988); *U.S. v. Mitchell,* 463 U.S. 206, 227 & n.32 (1983); *cf. Morton v. Mancari,* 417 U.S. 535, 550 (1974) (repeal by implication is disfavored); *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975) ("'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available"). Statutes that foreclose alternate forms of review use stronger language that §307(e). *Compare* 42 U.S.C. §405(h) ("[n]o action against the United States... or any officer... thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter") *with* 42 U.S.C. §7607(e) ("Nothing *in this chapter* shall be construed to authorize judicial review of [EPA] regulations or orders... under this chapter, except as provided in this section") (emphasis added); *cf. Heckler v. Ringer,* 466 U.S. 602, 616-17 (1984) (assuming without deciding that §405(h)'s exclusion of jurisdiction *under 28 U.S.C. §1331* does not foreclose jurisdiction *under 28 U.S.C. §1361*).

The APA waives sovereign immunity for equitable and declaratory relief against agency action, 5 U.S.C. §702, and requires courts to "decide all relevant questions of law, interpret... statutory provisions, and determine the meaning

or applicability of the terms of an agency action" 5 U.S.C. §706. In the absence or inadequacy of statutory review, the APA authorizes declaratory as well as injunctive relief, 5 U.S.C. §703, unless a "statute[] preclude[s] judicial review." 5 U.S.C. §701(a)(1). The Clean Air Act expressly exempts enumerated regulations and other final agency action from the APA, 42 U.S.C. §7607(d)(1) ("provisions of section 553 through 557 and section 706 of title 5 shall not... apply to actions to which this subsection [307(d)] applies"), but that exclusion expressly does not include *interpretive rules. See id.* ("subsection [307(d)] shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5"). Because no statute precludes their granting declaratory relief on the nugatory effect of EPA's reinterpretations, the courts below obviously have jurisdiction to declare the law.

The Declaratory Judgment Act, 28 U.S.C. §§2201-2202 ("DJA"), authorizes declaratory relief "whether or not further relief... could be sought." 28 U.S.C. §2201(a); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70-71 n.15 (1978) ("While the [DJA] does not expand our jurisdiction, it expands the scope of available remedies" where plaintiffs sought declaratory relief that a statute was invalid as an alternate remedy to seeking compensation for a taking). Since 1976, §1331 has authorized DJA actions against federal officers, regardless of the amount in controversy. *Sanders*, 430 U.S. at 105 (quoted *supra*). Moreover, the availability of declaratory relief against federal officers predates the APA, WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace such relief, either as enacted in 1946 or as amended in 1976. *See* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY,

S. Doc. No. 248, 79th Cong., 2d Sess., at 37, 212, 276 (1946); 5 U.S.C. §559; *Darby v. Cisneros,* 509 U.S. 137, 153 (1993) (rejecting argument that 1976 APA amendments expanded APA's preclusion of review) (*citing* 5 U.S.C. §559 *and Dickinson v. Zurko,* 527 U.S. 150, 154-55 (1999)). Thus, even if the APA's adequate-remedy and preclusion-of-review provisions preclude declaratory relief *under the APA,* 5 U.S.C. §§704, 701(a)(1), Duke nonetheless could obtain that relief *under the DJA.*

Sovereign Immunity

Assuming *arguendo* that the APA neither provides judicial review (§706) nor waives sovereign immunity (§702), the United States' sovereign immunity would raise two interesting questions: (1) can a court grant declaratory relief against a federal agency in an enforcement action, if the United States has not waived sovereign immunity for such relief, and (2) if not, could Duke file a cross complaint against a relevant EPA officer to enable the court to grant declaratory or equitable relief for *ultra vires* conduct? Assuming again *arguendo* that the APA neither provides judicial review nor waives sovereign immunity, this Court should answer the foregoing questions (1) no, *U.S. v. U.S. Fidelity & Guar. Co.,* 309 U.S. 506, 513-14 (1940) ("suability of the United States..., whether directly or by cross-action, depends upon affirmative statutory authority"), and (2) yes, *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689 (1949) ("where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions"). On balance, and providing that it follows the procedural prerequisites, Duke still could obtain a declaratory ruling against EPA or its officers that confines the PSD regulations consistently with the decisions below.

Even if this Court finds the APA's waiver of sovereign immunity not to apply and if Duke does not cross complain against an EPA officer, the presence of the environmentalist intervenors (who cannot assert sovereign immunity) renders sovereign immunity irrelevant here. Given that the courts below freely could enter declaratory relief against the environmentalist intervenors, *a fortiori* nothing precludes those courts' merely interpreting the applicable regulations consistently with EPA's contemporaneous interpretations and the Clean Air Act, as part of deciding litigation properly before them.

C. §307(b)(2) Is Unconstitutional as Applied

Allowing §307(b)(2) to preclude Duke's arguments here would allow an agency to enforce a procedurally invalid reinterpretation of its regulations over what the regulations actually provide. If the Constitution has any vitality against administrative overreaching, *see* John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612, 618 (1996) ("separation of powers doctrine includes the requirement of some minimum separation between lawmaking and law-exposition"), framing the question in that light answers the question: §307(b)(2) cannot prevent courts' interpreting duly promulgated regulations consistent with the agency's contemporaneous interpretations and rejecting the agency's subsequent, procedurally invalid amendments under the guise of interpretation.

II. POST-PROMULGATION REINTERPRETATIONS WARRANT LITTLE OR NO DEFERENCE

EPA concedes that Duke's interpretation is permissible, EPA Br. at 35, but contends that courts must defer to EPA's

current interpretation of the 1980 PSD regulations. *Id.* at 37. Because Duke interprets the regulations consistently with EPA's contemporaneous, authoritative interpretations of the PSD rules, however, courts cannot defer to EPA's amendatory, post-promulgation reinterpretation.

Instead, if EPA no longer approves of the regulations it promulgated in 1980, as correctly interpreted by the courts below and by EPA contemporaneously with their promulgation, EPA could initiate notice-and-comment rulemaking to amend the regulations. EPA cannot, however, simply amend those regulations by reinterpreting them. Moreover, even if EPA amends its *nationally applicable* PSD regulations, EPA nonetheless also would need to amend the *regionally applicable* PSD regulations for North and South Carolina before those changes prospectively would affect Duke's power plants in the Carolinas.

A. EPA Cannot Amend its Regulations by Reinterpretation

This section considers the deference that courts owe to EPA's current interpretation of the PSD regulations. Although interpretive rules may function as precedents, they do not enjoy *Chevron* status as a class. *U.S. v. Mead Corp.*, 533 U.S. 218, 232 (2001) (*citing Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984)). Unfortunately, the somewhat related *Seminole Rock* doctrine often leads courts to confer greater-than-*Chevron* deference to spurious, post-promulgation agency interpretations of vague agency regulations. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) ("ultimate criterion" for judicial construction of ambiguous regulation "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"); *Ehlert v. U.S.*, 402 U.S.

99, 105 (1971) (reviewing court must accept a "plausible construction of the… regulation"); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696-97 (1991). Whereas *Chevron* encourages legislators to "pass the buck" by enacting vague statutes for agencies to implement, *Seminole Rock* encourages agencies to "hide the ball" by promulgating vague regulations that they themselves authoritatively interpret, post-promulgation.

It does not matter whether agency personnel intentionally promulgate vague regulations to work mischief (*e.g.*, to accomplish by post-promulgation fiat what they could not accomplish in a rulemaking) or merely choose that course because of short resources or simple laziness. Nor does it matter here whether EPA officials knew they had changed prior interpretations or instead merely acted negligently, without institutional memory. The point is that *Seminole Rock* creates incentives inconsistent with transparent rulemaking in which the public has the notice that underlies the APA's concern for notice-and-comment rulemaking. *See* Manning, 96 COLUM. L. REV. at 655-57; *cf. Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 741 (1996) ("notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation"). Moreover, the "general[] expect[ation that] an administrative regulation [will] declare any intention to pre-empt state law with some specificity… serves to ensure that States will be able to have a dialog with agencies regarding pre-emption decisions *ex ante* through the normal notice-and-comment procedures of the Administrative Procedure Act." *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 908-10 (2000) (interior citations omitted).

Even worse, the "*Seminole Rock* presumption – that an agency's delegated rulemaking power implicitly authorizes the agency to construe its own handiwork – contradicts [separation of powers,] a core structural commitment of our constitutional scheme." Manning, 96 COLUM. L. REV. at 639-40. The laxness of allowing executive agencies to serve in both lawmaking and law-exposition functions contrasts markedly with this Court's separation-of-powers jurisprudence. *Id.* at 651-53 (*citing INS v. Chadha*, 462 U.S. 919, 952-58 (1983), *Bowsher v. Synar*, 478 U.S. 714, 726 (1986), *and Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276-77 (1991)). Like Professor Manning, *id.* at 686-88, *amicus curiae* APA Watch urges the Court to replace *Seminole Rock* deference with *Skidmore* deference, judging an agency's interpretation of its regulations by the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Where Congress has delegated rulemaking authority to an agency, that agency either follows all applicable rulemaking requirements or acts *ultra vires* its delegated rulemaking authority. *Cf. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (recognizing that "an agency literally has no power to act... unless and until Congress confers power upon it"). For that reason, whether it applies *Seminole Rock* or *Skidmore* deference to agency interpretations *generally*, this Court should grant no deference to agency interpretations that change (without explanation or notice-and-comment rulemaking) a prior agency interpretive or legislative rule. *See* 5 U.S.C. §551(5) (defining "rule making" as the agency process for amending

a rule); Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?, 41 DUKE L.J. 1311, 1355 (1992) ("[i]f a document expresses a change in substantive law or policy… [that] the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures"); *see also, e.g., Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Alaska Prof'l Hunters Ass'n, Inc., v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997). Where an agency (like EPA here) purports to amend a rule without the required rulemaking, it acts *ultra vires*, and deserves no deference under either *Seminole Rock* or *Skidmore*.

The parties and other *amici* adequately cover the dispute over the permissibility of multiple meanings springing from the same definition. Even if it rejects the Fourth Circuit's holding that §111(a)(4) and §169(2)(C) create an un-rebuttable presumption that "modification" *must share* the same meaning for NSPS and PSD purposes, however, this Court nonetheless should fault EPA for reinterpreting the authoritative, contemporaneous interpretations that those terms *do share* the same meaning, 43 Fed. Reg. 26,380, 26,396 (1978) (quoted *supra*); JA 23-34 (PSD determinations circa 1981 and 1983), without any administrative process or explanation for the changed position. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (course change requires reasoned analysis beyond that required to act in the first instance). Having interpreted those provisions to share the same meaning, EPA's unexplained reversal should fall to

an *un-rebutted* presumption, even if it does not fall to the Fourth Circuit's *un-rebuttable* presumption.

B. EPA Cannot Amend the States' Regulations by Reinterpretation

Even if EPA could amend its PSD regulations by reinterpretation, EPA's reinterpretation many years later nonetheless would not retroactively amend the rulemakings that promulgated the North and South Carolina PSD rules *in 1982*. 47 Fed. Reg. 7836 (1982) (approving North Carolina PSD regulations); 47 Fed. Reg. 6017 (1982) (same for South Carolina). Such unilateral EPA action would violate both federalism and federal law.

First, if EPA no longer approves of the PSD regulations for North and South Carolina, EPA has ample prospective authority to prevent PSD violations and work with the states to correct their PSD rules. 42 U.S.C. §§7410(c), 7413(a)(5), 7477; *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 484 (2004). That federal-state disagreement, however, should not involve Duke's facilities or any other retrospective and long-ago permitting issues. *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 502, 506-07, 518 (federalism concerns with EPA's overstepping state prerogatives under CAA) (Kennedy, J., dissenting); *Georgetown Univ. Hosp. v. Bowen*, 488 U.S. 204, 208-09 (1988) (absent an express delegation conferring it, federal agencies lack authority to issue retroactive regulations); *cf. Geier*, 529 U.S. at 908-10 (federal agencies expected to declare regulatory preemption with specificity through rulemaking process) (quoted *supra*); 42 U.S.C. §7401(a)(3) (state and local government bear primary responsibility for controlling and preventing air pollution at its source).

Second, for the reasons already set forth in Section II.A, *supra,* the APA precludes EPA's amending the 1982 regulations by summarily reinterpreting them to mean what EPA wants them to mean today. Simply put, EPA must conduct a rulemaking to amend the North and South Carolina rules. *See* 5 U.S.C. §551(5) ("rule making" is the process for amending a rule).

CONCLUSION

Because they were properly decided, this Court should affirm the decisions below.

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Respectfully submitted,

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